No. 8369.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

6

The National Supply Company, Midwest, a corporation,
Complainant,
vs.
The Elmer Company, Ltd., a corporation,
Defendant.

Howard W. Stepp, Claimant,
Appellant,
vs.
Ed McAdams, Receiver of The Elmer Company, Ltd., a corporation,
Appellee.

APPELLEE'S BRIEF.

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Ed McAdams, Receiver of The Elmer Company, Ltd., a corporation,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF ISSUES INVOLVED.

The question to be determined on this appeal is the proper status or priority to be accorded appellant's claim with relation to the large number of general claims presented by creditors of the receivership estate of The Elmer Co. Ltd. To clarify the issues, we will list the classifica-

tions in which Appellant's claim might be adjudged to belong.

One: Appellant's claim is subordinate and junior to those of the general creditors.

Two: Appellant has a general claim, equal in rank to that of the other general creditors in the amount agreed to be paid him by The Elmer Co. Ltd. under the contract of November 25, 1929 [R. 27].

Three: Appellant has a general claim equal in rank to that of the other general creditors in the amount of his unpaid charges under the contract (i. e. $35,361.38).

Four: Appellant has an equitable lien against the funds derived by The Elmer Co. Ltd. from the sale of oil from Jameson wells Nos. 2, 3, 4 and 5 in such amount as was agreed to be paid him by The Elmer Co. Ltd. under the contract of November 25, 1929 [R. 27].

Five: Appellant's claim for the full amount of his charges (i. e. $35,361.38) is prior and preferred to the claims of any of the general creditors.

Appellant asserts for the first time in this appeal that his claim should be in the *fifth* catagory listed above: that is, a prior claim for its full face amount. A brief review of the record will disclose the earlier contentions Appellant has made regarding his claim.

On March 6, 1931, Appellant executed his Proof of Claim against the Receivership Estate [R. 25] in which he sets up the agreement of November 25, 1929, as an exhibit and states that there is due him the sum of $35,361.38, "payable out of 15% (fifteen per cent) of the production received by The Elmer Company upon said wells, Jameson No. 2, No. 3, No. 4, and No. 5, or such other amount

of the production as it may hereafter be established that Plaintiff is entitled to lawfully receive".

On June 10, 1931, Appellant filed in the District Court, a Motion to Establish Claim and for Restraining Order [R. 4]. This Motion prayed that Appellant's Claim be established as an equitable lien upon wells No. 2, No. 3, No. 4, No. 5 at Santa Fe Springs to the extent of 15% (fifteen per cent) of the net production accruing from the same, to be applied upon the amounts due Appellant. A Petition for Order to Show Cause, filed by Appellant in the District Court on October 1, 1931 [R. 16], contains a similar prayer.

The Special Master in his report filed in the District Court December 16, 1935 [R. 51, 58] concludes:

> "1. That by virtue of the contract of November 25, 1930 (1929?) the Claimant (Appellant) has an equitable lien against the proceeds of each of the wells, Jameson No. 2, No. 3, No. 4 and No. 5 in such proportions and amounts as provided in the contract. * * *
>
> "4. That the Claimant (Appellant) is entitled to an accounting from the receiver of the cost of the several wells covered by the contract of November 25, 1930."

The Receiver filed exceptions to this report of the Special Master on December 27, 1935 [R. 62] in which the above quoted conclusions of the Special Master are repeated and excepted to.

The Honorable District Court made its order January 25, 1936 [R. 65] "that said Claimant, Howard W. Stepp is denied and disallowed any preferred claim against the

Receiver herein or the Receivership Estate or funds and in lieu thereof said Howard W. Stepp is allowed as a general claim against the Receiver and against the Receivership Estate and funds in the amount of $35,361.38." There is nothing to indicate that the District Court, in disallowing Appellant a preferred claim, intended anything other than that Appellant was denied a claim of any kind or status other than that of a general creditor. From this order, Appellant appealed.

It will be noted that Appellant has consistently asserted, and that the report of the Special Master merely concludes that he had an equitable lien on the proceeds of certain specified wells. How much this lien might be worth in terms of dollars was to be determined by the accounting which the Special Master ordered [R. 59] and which has never been had.

The *fourth* classification as listed above is substantially the holding of the Special Master in his report [R. 58, 59].

The *third* classification is in accord with the decision rendered by the District Court in its order of January 25, 1936 [R. 65].

Classification *one* is what appears to be the proper status of Appellant's claim under a correct application of the law to the facts herein. The power of this Court to adjudge the claim to be in classes *one* or *two* will be discussed later in this brief.

Analysis of the Contract of November 25, 1929 Between The Elmer Co., Ltd. and Appellant.

The determination of the true status of Appellant's claim requires an interpretation of the contract between The Elmer Co. Ltd. and Appellant dated November 25, 1929 [R. 27].

As was said by this Court in *In re Lathrap*, 61 Fed. (2d) 39:

> "Our first task, in the language of the Supreme Court of California, 'is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it.' Walsh, etc. v. Hill et al., 38 Cal. 481, 487."

The first recitals of the contract in question, set out the interest held by The Elmer Company in certain drilling oil wells in the Santa Fe Springs field. The second paragraph contains the agreement by Appellant to furnish all bits and do all welding necessary or requested to be done on said oil wells. The third paragraph requires Appellant to keep a record of his charges. The manner of Appellant's payment as to Jameson wells Nos. 2, 3 and 4 is set out in paragraph 4 of the contract. The agreement as to well No. 2 will be considered and identical provisions are made as to Nos. 3 and 4.

The contract provides [R. 29]:

> "It is specifically agreed by and between the parties hereto that second party (Appellant) shall be paid for

the services rendered and to be rendered in connection with the drilling of said oil wells, as hereinafter set forth and in no other manner;

"(a) *As to Jameson Well No. 2.* For all bits furnished and welding done in connection with the drilling of Jameson Well No. 2, first party shall pay and second party shall receive that proportion of the value of Fifty per cent (50%) of the first oil produced from said well that the total charges of second party for furnishing the bits and welding for said well shall bear to the total cost of first party for the drilling of said well."

It will be observed that the amount of Appellant's charges in connection with this well bears only an indirect relation to the amount The Elmer Company agreed to pay and Appellant agreed to receive as payment therefor. This agreed payment may be expressed by the following formula:

$$\text{Agreed Payment} = \frac{\text{Market Price of oil produced} \times \text{Appellant's charges for furnishing bits and welding}}{2 \times \text{Total cost of The Elmer Co. for drilling the well}}$$

To state it another way, if the amount of Appellant's charges were known, then the agreed payment would vary in direct proportion to the value of the oil produced and in reverse or indirect proportion to the total cost of drilling the well. At the time the contract was entered into—

November 25, 1929—three of the factors involved in the foregoing equation were unknown, to-wit:

1. The value (market price) of oil produced.

2. Appellant's charges for furnishing bits and welding.

3. Total cost of The Elmer Company for drilling the well.

To state the equation in still another way: If double the value of the oil produced equaled the total cost of drilling the well, then the amount of Appellant's charges for furnishing the bits and welding would equal the amount agreed to be paid him for the same. If, however, twice the value of the oil produced was less or greater than the total cost of drilling the well, then the amount agreed to be paid to the Appellant would be less or greater than the amount of his charges by the same proportion.

All that has been said applies equally to the provision of paragraph 7 of the contract [R. 31], which has to do with Jameson well No. 5, except that in this case, Appellant was to furnish no further labor or materials, but was to be paid for those theretofore furnished on the basis of the same formula above set out.

The contract imposes absolutely no minimum and no maximum upon the amount to be paid Appellant. The amount of this payment might be zero if the value of the oil produced was zero, or it might be an indefinitely large amount (perhaps many times Appellant's charges) if the

In effect, Appellant said to The Elmer Company:

I will contribute a part of the cost of drilling this well and you contribute the balance. We will then divide ½ of the value (market price) of the oil produced in proportion to our contributions. You will pay me my share at the time and in the manner of the payments of landowner's royalties.

It is apparent that Appellant, in executing this agreement, deliberately embarked upon a highly speculative venture. He was to contribute his bits and welding services as an integral part of The Elmer Company's expense in drilling the well. If the well produced nothing, Appellant would receive nothing; but if it produced in large measure, he would be paid in large measure—a possibility which loomed attractive to him and which furnished ample consideration for the services and materials he agreed to and did furnish.

Nowhere in the contract does The Elmer Company promise to pay Appellant any definite amount; neither does it assign to him any interest in the well either present or potential, nor in any oil to be produced therefrom. It is simply a promise to pay him an indefinite amount of money, the amount of such payment to be computed in the manner above outlined.

ARGUMENT.

POINT I.

The Elmer Co. and Appellant Were Joint Adventurers, and Upon the Termination of the Enterprise, Liabilities to Creditors Other Than the Joint Adventurers Must Be Paid in Advance of Amounts Due to the Joint Adventurers.

A joint adventurer has been defined under California Law as a joint association of persons in a common enterprise for profit, but falling short of a partnership. One or more of the parties may not have the usual power of a partner to bind the adventure or to take part in the management of the enterprise. 14 *Cal. Jur.* page 760.

The California Supreme Court in *Hansen v. Burford,* 212 Cal. 100, 297 Pac. 908 at 912, defined a joint adventure as "a special combination of two or more persons where in some specific adventure a profit is jointly sought, without any actual partnership or corporate designation."

The facts of the present case are so close to those which were before this Honorable Court in *In re Lathrap,* 61 Fed. (2d) 37, that we will set out the essential facts of the two cases in comparative form:

Frank H. Lathrap was the lessee of certain oil property and was engaged in drilling thereon prior to becoming bankrupt. The Elmer Co. was the lessee of certain oil property and was engaged in drilling thereon prior to being taken over by a Federal Receiver.

In the *Lathrap* case, the dispute was between the Trustee in bankruptcy and certain "per cent holders" who sought priority over general creditors. In the present case, the dispute is between the receiver of The Elmer Company and Appellant who also seeks priority over the general creditors.

In the *Lathrap* case, the "per cent holders" paid a cash consideration. In the present case Appellant furnished labor and supplies.

In the *Lathrap* case the "per cent holders" received an assignment of a royalty interest equivalent to one per cent of the oil and/or gas produced and sold from the well. In the present case, Appellant received a promise to be paid a certain proportion of the value of 50% of the first oil produced from the well (the determination of this proportion was controlled by a formula which has already been discussed).

In the *Lathrap* case, there was neither maximum nor minimum limit to the amount the "per cent holders" might receive. In the present case, there was neither maximum nor minimum limit to the amount appellant might receive.

In the *Lathrap* case, the "per cent holders" were to be paid through a bank which was authorized to collect amounts due from purchasers of the oil. In the present case, Appellant was to be paid at the time and in the manner of the payment of landowner's royalties.

In the *Lathrap* case the parties attempted to avoid an adjudication that they were partners, or co-adventurers, by including the following provision in their contract:

> "It is further understood that no relationship other than that of vendor and vendee is intended to be

> created by this Assignment, and that no co-partnership or association of any kind or description whatsoever is intended to be hereby created, nor shall same constitute Assignee Co-Lessee of said premises."

In the present case no such provision is included in the contract.

Notwithstanding the last above quoted attempt by the parties in the *Lathrap* case to declare that they were not joint adventurers or partners, the Court asks the following pertinent questions:

> "The determination of this case hinges upon the relationship of these 'per cent holders' to the bankrupt. Are they outright purchasers of the bankrupt's oil? Or are they *cestuis que trustent,* preferred creditors, junior creditors, sleeping partners, joint adventurers, grubstakers—or still something else?"

Later in the opinion, the Court answers these questions as follows:

> "Whether or not the per cent holders come under the technical classification of stockholders, they are, —like stockholders, partners or joint adventurers— 'investors,' participants in the common enterprise. Had the bankrupt prospered and continued the operation of the oil well, these per cent holders would have prospered with him, to an extent that their certificates did not even attempt to limit. Conversely, these same holders must be prepared to share in the bankrupt's misfortunes. There is no equity in their favor that places them in a position equal to that of general creditors, who sold merchandise or labor at only a normal profit. The creditors should not be the first to be sacrificed. It is the 'investors' who should be

> "In Armstrong et al v. Union Trust & Savings Bank, 248 F. 268, 271, this court said: 'These certificate purchasers must be held to full knowledge and appreciation of the real character of their investments, and that they were to become participants in the enterprise, and not mere creditors of the corporation. To intimate otherwise would be to impugn their intelligence."

On page 270 of the same opinion it was stated:

> "The stockholder must therefore stand aside in the winding up of the business of a corporation until its creditors are paid, before he can share in the assets. * * *"

Appellant at page 29 of his Brief attempts to distinguish the *Lathrap* case, *supra,* on the ground that he (Appellant) "is only a creditor who sold labor and material at a nominal profit," and furthermore, "the amount he was to receive for his labor and material did not vary as The Elmer Co. Ltd. prospered, but on the contrary, was limited to the amount of the indebtedness of The Elmer Co. Ltd. to him."

These assertions are not in conformity with the provisions of the contract which appear in the Record at page 27, et seq. The only function of the reference to the charges of Appellant for work done as set out in paragraph three of the Contract [R. 29] is to provide a factor in the formula for determining the amount he was to be *paid* as set out in paragraph four of the same Contract. As to this amount of *payment,* there was neither a minimum nor a maximum limit, and the language above quoted from the *Lathrap* case, is particularly apt.

Appellant makes a further point that all told, he furnished labor and material under the contract in the sum of $40,085.70 (in other words, his charges as defined in the contract), and that he received on account $4,724.32, leaving a balance of $35,361.38 for which he now makes claim. If Appellant incorrectly applied the sum he had received, in computing the amount of his claim, he has no one but himself to blame. It is manifest that the sum he received should have been credited on the amount agreed to be paid him by The Elmer Co. Ltd., and that the amount of his charges should have been left at the original figure for use in computing the amount due him under the terms of the contract.

In *Nowell v. Oswald,* 96 Cal. App. 536, 274 Pac. 423, the Court considered a contract whereby one party in consideration of a loan of $2,000.00 was given an undivided ½ interest in the net proceeds to be derived from a show to be staged by the other party. No provision was made for the return of the money except that it was to be paid back from the gross proceeds derived from the show before the division of the profits. Notwithstanding a provision in the contract that the lender was not to be held responsible for any debts incurred in the production, the Court held him a joint adventurer in the enterprise and liable as such to creditors.

The Court says:

> "The sole question presented on appeal is the correctness of the trial court's decision that appellant

> Oswald was a joint adventurer with others in the production of a theatrical exhibition and therefore liable to employees for claims for labor. We are satisfied that the ruling of the trial Court was correct. Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann. Cas. 1916E, 437; Chapman v. Hughes, 104 Cal. 302, 37 P. 1048, 38 P. 109; Leake v. City of Venice, 50 Cal. App. 462, 190 P. 440."

Treat v. Murdock, 84 C. A. D. 645, 55 Pac. (2d) 547, presents a situation strikingly similar to the one in the case at bar. Murdock held the right to operate a mine on a royalty basis. Co-defendant, Moreno advanced money to Murdock from time to time and took Murdock's promissory notes therefor. Moreno operated a fruit market and was not in the mining business. He knew, however, that the money he advanced to Murdock was being used in the mining operations and on four occasions visited the mine, but had no active part in its management or operation.

Plaintiff in the action furnished goods, wares, and merchandise, which were consumed at the mine, and brought this action against both Murdock and Moreno on the theory that they were co-partners and were engaged in the business of mining. The gist of the cause of action is that the defendants became indebted to Plaintiff as joint debtors on an open book account. The judgment went for Plaintiff and the Defendant, Moreno appealed. The Court holds on the authority of *Shannon v. Calmus,* 70 Cal. App. 652, 234 Pac. 170, that it is immaterial whether or not the

arrangement constituted a mining partnership, the important question being whether the defendants were jointly indebted to Plaintiff upon the account. The Court says:

> "Concluding, as we do, that the finding of the trial court upon the question of the mining partnership is immaterial, the judgment must be affirmed if there is evidence supporting the finding that the appellants became indebted to respondents upon any theory. If it is conceded, as urged by appellants, that the defendants did not constitute a partnership in the full and generally accepted sense, or a mining partnership within the qualifications of the Code sections, nevertheless, the evidence supports the implied finding that they were engaged in a joint adventure. If money is loaned by one to another with the understanding that it is to be repaid whether the venture in which the money is to be used proves a success or a failure, the relationship is usually construed to be that of borrower and lender. '*But if the person receiving the money assumes no obligation for its return, and it is subject to the risks of the business, the partners have usually been held to be joint adventurers,* notwithstanding the contract provides that the money is to be returned with interest before the net profits are divided, or that the lender is to receive notes as security for the money invested, or is to be given a lien upon the property put into the venture.' 33 C. J. 843.
>
> "The inference can reasonably be drawn from the evidence detailed that appellants, although protecting themselves to the extent of securing notes to represent advances, and at times insisting upon security for

> the repayment of their contributions, by agreement either express or implied, had a present interest in the mine as well as to future recoveries therefrom.
>
> "The liability of the members of a joint adventure extends to all contracts reasonably necessary to carry on and within the scope of the business in which the joint adventure is engaged. (Italics ours.) (Note: In the above case, hearing was granted by the California Supreme Court, April 27, 1936. At the time of this Brief, no decision had been rendered by that Court.)"

In Treat v. Murdock, supra, Moreno furnished money to assist his joint adventurer, Murdock, in the mining operations. In the instant case, Appellant, Stepp, furnished bits and welding services to The Elmer Company to assist it in drilling an oil well. Appellant here had a more active part in the oil well operations than Moreno did in the mining operations. In both cases, repayment was contingent upon production with no other obligation assumed for its return.

One of the parties to a joint adventure may be a corporation. *Lerner v. Sanderson,* 126 Cal. App. 481, 14 Pac. (2d) 564. *Wyoming-Indiana Oil and Gas Company v. Weston,* 43 Wyoming 526, 7 Pac. (2d) 206.

If the relationship of joint adventurers is found to exist, then in the event of liquidation, the rules of partnership apply and the firm assets must be applied first to the payment of creditors other than the partners and next to amounts due the partners.

> *Cal. Civ. Code.* 2434.

POINT II.

Even if Appellant Were Not a Joint Adventurer With The Elmer Co., He Has at Most a General Claim in the Amount Agreed to Be Paid Him Under His Contract.

If this Honorable Court after considering the contract here involved, concludes that Appellant and The Elmer Company were not joint adventurers, then, we respectfully submit, the most that can be said for Appellant's position is that he is a creditor of the Receivership on the same footing as the other general creditors, the amount of his claim to be determined in accordance with the provisions of his contract.

The only obligation assumed by The Elmer Company is that it would pay Appellant a sum of money upon the happening of a certain contingency, namely, the production of oil from the designated well. When this event occurred, The Elmer Company was obligated to pay Appellant an amount as provided in the contract, the mechanism of determining which amount having been already fully discussed, *supra*. It is important to remember that this elaborate formula has to do solely with the *amount* The Elmer Company agreed to *pay* Appellant. This amount is not made payable out of any particular fund, nor is it made a lien on any particular fund, and there is no fund mentioned upon which it could be a lien. There is nothing in the contract requiring The Elmer Company to sell the oil when produced, and thus create a fund out of which Appellant was to be paid. The contingency that The Elmer Company might not sell the oil is covered in paragraph 5 of the contract [R. 30] where it is provided

that the payments "shall be made at the time and in the manner of payments of landowner's royalties as specified in the respective properties; and *shall be based on the market price of the oil.* It is the intention of the parties hereto, that the payments shall be made by first party to second party only as when and if oil is produced from said wells by first party * * *"

The parties therefore defined the *time* and *amount* of the payment to be made, but did not designate any fund from which it should be made nor even require or anticipate that such a fund should come into existence.

Further emphasis is laid upon the speculative character of the enterprise upon which Appellant was embarking, by the provisions of the 6th paragraph of the contract [R. 31], wherein he retains the right at any time to cease furnishing bits or doing work upon five days' written notice to The Elmer Company. It is apparent that Appellant was only willing to continue his contributions to this joint adventure so long as he was convinced it would turn out profitably, and he retained the definite right to withdraw from the adventure whenever it appeared to him to be no longer promising. An identical right to cease its activities in the joint adventure was retained by The Elmer Company under the provisions of paragraph 5 of the contract [R. 31]. Thus both the parties to this contract (like ordinary partners) retained the right to withdraw from the enterprise whenever it seemed to them to be no longer promising.

Appellant lays much emphasis upon the fact that The Elmer Company agreed to pay the designated proportion of the value of the *first* oil produced. We understand this to mean nothing more than that Appellant was to begin

receiving his pay as soon as his joint adventurer, The Elmer Company, had received anything of value from the enterprise. It has no significance other than to assure Appellant a participation equal in point of time with that of The Elmer Company.

POINT III.

The Contract Here Involved Does Not Give Appellant an Equitable Lien for It Does Not Clearly Appear That the Parties Intended to Charge a Particular Fund as Security for a Debt, and at Most It Merely Evinces an Expectation That the Debt Will Be Paid Out of a Particular Fund.

Neither the authorities cited in the report of the Special Master [R. 54] nor any other authorities which have come to our attention go the length of holding that a contract like the one in the present case creates an equitable lien.

Barnes v. Alexander, 232 U. S. 117, 58 Law. Ed. 530, involved a promise by one attorney (Barnes) to pay another attorney (Street) 1/3 of the contingent fee which Barnes was to receive in the event of the successful outcome of certain litigation, provided Street assisted Barnes in the conduct of the case. There was no written contract, but Barnes said to Street, "If you will attend to this case, I will give you 1/3 of the fee which I have coming to me on a contingent fee * * *." Upon the conclusion of the litigation, Mrs. Barnes representing her husband, brought an action for an accounting of the property received in settlement of the mining suits. Appellee, Alexander, intervened in the action, claiming 1/3 of the contingent fee. So far as the decided case is concerned, it had to do solely

of Barnes and Street, who made the original agreement. There are no rights of creditors involved as in the instant case. Furthermore, the Court bases its decision on the finding that Barnes had promised "that if, when, and as soon as he should receive an identified fund, 1/3 of it should go to the Appellees." The distinction between such a promise and a promise of the character involved in the instant case, is indicated by the following language:

> "Barnes gave no general promise of reward. He did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means of enabling him to do it."
>
> See *National City Bank of New York v. Hotchkiss,* 231 U. S. 50.

The last quoted language indicates that an equitable lien does not result when the promise merely refers to the fund as a means of enabling the debtor to pay.

In *Jackman v. Newbold,* 28 Fed. (2d), page 107, quoted *infra,* the same distinction is emphasized.

In re Interborough Consolidated Corporation, Bankrupt, 288 Fed. 334, also cited in the Special Master's report is no authority for the assertion that this contract creates an equitable lien, but rather the reverse. In that case, the United States Circuit Court of Appeals for the Second Circuit had for consideration a situation where the bankrupt corporation, a short time before bankruptcy, deposited in the bank a fund to meet interest on the outstanding bonds of the corporation. The controversy is between holders of the bonds who claim the funds in payment of their interest, and the Trustee of the bankrupt corporation. The lower Court held in favor of the

Trustee, and on Appeal, this decision was affirmed. A writ of certiorari was later denied by the United States Supreme Court. The Court says:

> "It has been held that even an agreement to pay a debt out of a designated fund does not in itself create a lien upon the fund. Thus, it is laid down in 19 Am. & Eng. Enc. Law, 2d ed. p. 16, as follows: 'But a mere agreement to pay a debt out of a designated fund does not give an equitable lien upon the fund, or operate as an equitable assignment thereof. There must be an appropriation of the fund *pro tanto,* either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.'"

Barnes v. Alexander, supra, is thereupon cited in the opinion. Some additional language used in the opinion relative to the creation of an equitable lien is of little help in the present case for the reason that in the case there considered, an actual fund had been created and set apart to which the bond holders were laying claim. It has already been pointed out that in the present case, there was no such fund either present or prospective.

The inapplicability of the quotation from *Pomeroy Equity Jurisprudence,* 1233, made by the Special Master [R. 54] is shown by the limitation placed on the rule to a situation "whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer * * *."

Such an intention is entirely lacking in the contract now before the Court.

Three recent Federal cases consider the question of equitable liens. In *Jackman v. Newbold,* 28 Fed. (2d) 107, the Court says:

"An equitable lien may be established by verbal agreement. The intention to charge the particular property with a lien as security for the debt, or that the fund derived from the sale of the property shall be likewise charged with a lien, must clearly appear. Great Northern State Bank v. Ryan (C. C. A.), 292 F. 10. *A mere expectation that a debt will be paid out of some particular fund when the fund arises, or even an agreement to that effect, does not establish an equitable lien upon the fund.* The Supreme Court of the United States has held that 'an agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment.' Christmas v. Russell, 14 Wall. 69, 84, 20 L. Ed. 762. (Italics ours.)

"In Jones on Liens, vol. 1, p. 48, it is said: 'A mere agreement, whether by parol or in writing, to pay a debt out of a designated fund, when received, does not give an equitable lien upon that fund or operate as an equitable assignment of it. The agreement is personal merely.'

"In section 50 of the same work it is said: 'To constitute an equitable lien on a fund, there must be some distinct appropriation of the fund by the debtor, such as an assignment or order that the creditor should be paid out of it.'

"In section 52 of the same work: 'The promise of a debtor to pay a debt out of a particular fund is not sufficient. There must be an appropriation of the fund *pro tanto,* either by giving an order on the specific fund, or by transferring the amount otherwise in such a manner that the holder of the fund

is authorized to pay the amount directly to the creditor without the further intervention of the debtor.'

"See also, Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; Franklin v. Browning (C. C. A.), 117 F. 226; 19 Am. & Eng. Ency. of Law (2d Ed.), 16."

The above quoted language is similar to that in *Barnes v. Alexander, supra,* to the effect that a mere expectation that a debt will be paid out of some particular fund when the fund arises, or even an agreement to that effect, does not establish an equitable lien upon the fund. The most that can be said for the contract in the instant case is that the parties may have expected to make the payment to Appellant out of a fund to be derived from the sale of oil when and if such sale was made and such fund created. Even this expectation if it existed is not specifically expressed, but must be inferred from the language of the contract.

The Circuit Court of Appeals for the Fourth Circuit considered the rights of one claiming an equitable lien as against a trustee in bankruptcy in *Penn Lumber Co. v. Wilson,* 26 Fed. (2d) 893. Prior to its bankruptcy, the Hamilton Company agreed with the Penn Company that if the latter would make certain advances, the bankrupt would furnish it lumber upon orders to be given. The advances were made in the form of notes or acceptances.

At the time of bankruptcy, five notes had been delivered to the bankrupt, but the lumber covering the same had not been delivered although orders specifying the grades, sizes, and prices of lumber to be shipped had been placed with the bankrupt. There was sufficient lumber in the bankrupt's yards to cover these orders but no specific lumber had been set aside for this particular pur-

pose. The Penn Company was compelled to pay the notes and then sought to establish an equitable lien on the lumber or the proceeds of its sale in the hands of the trustee in bankruptcy.

The Court, in holding that no equitable lien exists, says:

> "It is clearly the rule in the case of equitable liens that it must appear that it was the intention of the parties that certain specified property should be set aside and appropriated as security for the payment of a particular debt, that such property had actually been set aside and appropriated for this particular purpose, and that it can be clearly identified as the property the parties had in mind at the time. National City Bank v. Hotchkiss, *supra;* Marshall v. Roettinger (C. C. A.), 294 F. 158. In this latter case the Hurley Case was also discussed, and we think properly distinguished with regard to its application to a situation similar to this one. * * * While an equitable lien arising from express contract, as here, may be enforceable against the specific property embraced in the contract in the hands of the contractor and subsequent purchasers and encumbrancers with notice, *it may not be enforced against prior encumbrancers or subsequent encumbrancers without notice. In re* Ronk (D. C.), 111 F. 154; Morgan *et al.* v. First National Bank of Mannington *et al.,* 145 F. 466, 76 C. C. A. 236; Moore v. Green *et al.,* 145 F. 472, 479, 76 C. C. A. 242. *'The Trustee belongs to the latter class.'* See also, *In re* Traut's Estate (C. C. A.), 297 F. 458; Marshall v. Roettinger, *supra;* Burnett v. Frederick (C. C. A.), 263 F. 681; Herritt v. Clark (C. C. A.), 247 F. 100." (Italics ours.)

The above quoted language is particularly apt in view of the admission in Appellant's Brief at page 15, reading as follows:

> "No assignment or royalty interest was made or created or even contemplated in favor of Appellant. He was to receive nothing that could ripen into a title. He had no right under the contract to participate in the earnings of The Elmer Company, Ltd., and no royalty interest was in any manner pledged or issued to him as a security."

And also the statement on page 28 of the same brief that the so-called equitable lien of Appellant cannot ripen into a title. It seems clear that if Appellant has an equitable lien then it must be a lien upon some specific thing which can ripen into title, otherwise it is no lien at all. The very objective Appellant has in this litigation defeats his own contention. He seeks to recover the money which he asserts is due him under this contract (in other words, ripen title to it) in advance of the claims of general creditors. To accomplish such a result, he must have a lien or asssignment capable of ripening into title, and yet this is the very thing which he asserts in his brief he does not have.

In *Carsons v. Long-Bell Lumber Company,* 73 Fed. (2d) 397, the Appellants had what seems a much stronger claim to an equitable lien than the one asserted by Appellant here. The Long-Bell Company, in connection with certain mortgage bonds it was offering for sale, issued a circular which recited that the bonds "will be secured by a first mortgage on unencumbered standing timber * * * and will be further secured by a mortgage on plants, mills, and other property, etc." The mortgage on the timber was executed, but the mortgage

on the plants, mills, and the other property was not. It was contended that under the agreement contained in this circular, Appellants were entitled to an equitable lien on assets of the company not covered by the timber mortgage. The Court rejects this claim and says at page 403, "* * * We are of the view that no equitable lien expressed or implied was created by such a circular."

POINT IV.

Equity Appeals Are Trials De Novo, and the Appellate Court Considers the Whole Case Both Fact and Law, and the Finding of the Court Below Is Not Conclusive.

The Learned Judge of the District Court, in amplifying his order of January 25, 1936 [R. 65], wherein the Receiver's exceptions to the Special Master's report upon the claim of Appellant were allowed and sustained, stated that "the Special Master was correct in determining that an equitable lien is created by the charge imposed by reason of the contract between Stepp and The Elmer Company," and he further states that "solely as between the parties to the agreement, the equitable lien that is created by the contract would have been enforcible * * *."

We respectfully contend, however, that an equitable lien did not arise either as between the parties themselves, or with respect to the rights of the third parties. The rule is well settled that an Appellate Court is not bound by the grounds on which a lower Court has based its judgment, and that where the decision by the intermediate Court was correct, an error in the reasoning will not justify a reversal if it can be upheld on other grounds. (4 *Corpus Juris,* pages 1080, 1081.)

In equity cases such as this, the Appellate Court considers the whole case both fact and law, and the finding of the Court below is not conclusive.

Simkins' Federal Practice, p. 922.

Appeals in equity are trials *de novo,* and equity speaks as of the present.

Boynton v. Moffett, 57 Fed. (2d) 772. Writ of Certiorari denied in 287 U. S. 620.

The recent case of *Aro Equipment Corporation v. Herring Wissler Co.*, 84 Fed. (2d) 619, decided by the Circuit Court of Appeals for the 8th Circuit, discusses the broad reviewing powers of the Circuit Court of Appeals in equity cases. The Court says at page 621:

> "Counsel for appellee in their brief make this statement: 'The appellant having submitted no request for findings of fact and having taken no exceptions to, nor assigned for error, any of the lower Court's findings of fact, appellant is bound by such findings of fact and all of the logical inferences based thereon and therefore there is not available to the appellant any argument based on any alleged error or insufficiency in the lower Court's findings of fact.'
>
> "We cannot agree with this statement. An appeal in equity brings before the Appellate Court the whole record, and the court is required to examine the record and try the case *de novo.* The findings of the trial court, while entitled to great weight, may be adopted or discarded by the Appellate Court, even though supported by substantial evidence.
>
> "In Keller v. Potomac Electric Power Co., 261 U. S. 428, at page 444, 43 S. Ct. 445, 449, 67 L. Ed.

an appeal brings up the whole record and the Appellate Court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses. This court is therefore given jurisdiction to review the entire record, and to make the order or decree which the commission and the District Courts should have made.' "

The Court further cites as supporting this rule the following cases:

Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co. (C. C. A.), 188 Fed. 164, at p. 168;

Presidio Mining Co. v. Overton (C. C. A.), 270 Fed. 388;

Swift v. Jackson (C. C. A.), 37 Fed. (2d) 237;

Laursen v. Lowe (C. C. A.), 46 Fed. (2d) 303, 304;

Lewis v. Ingram (C. C. A.), 57 Fed. (2d) 463, 466.

To the same effect:

Burns Brothers v. Cook Co., 42 Fed. (2d) 109.

In *Watts v. Union Austriaca,* 248 U. S. 19, 63 L. Ed. 100, the Court said:

"This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. Butler v. Eaton, 141 U. S. 240, 35 L. Ed. 713, 11 Sup. Ct. Rep. 985; Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503, 506, 56 L. Ed. 860, 861, 32 Sup. Ct. Rep. 542."

This Court, at its option, may notice a plain error not assigned. Rule 11.

In this appeal, the single question for determination is the status of Appellant's claim in the Receivership Estate as to priority with respect to the other claims. As we have already pointed out at the commencement of this Brief, there are at least five possible classifications or degrees of priority to be considered. Invoking the above cited rules, and on the principle that the Appellate Court will make a final disposition of the case as justice may require, it is proper for this Court, if it should so conclude, to adjudge Appellant's claim to be in the first class (*i. e.*, that of a joint adventurer, and subordinate to the claims of general creditors).

Exceptions were taken by Appellee to the entire report of the Special Master in so far as it had to do with determining the status of Appellant's claim [R. 62].

Inasmuch as the whole record is before the Court and the single question for determination is the status of Appellant's claim with respect to the claims of general creditors, the Court has power to adjudge Appellant's claim to be in the first class as above set out, notwithstanding no cross-appeal was taken or cross-assignments made by the Appellee. It has been held that where the decision on a claim in a Receivership Estate is appealed from, the interest of all parties concerned is better subserved by a single appeal upon the entire allowance. This rule is stated in 53 *Cor. Jur.*, page 241, citing as authority the early California case of *Adams v. Woods*, 8 Cal. 306.

Multiplicity of Assignments of Error are condemned.

Ocean Accident v. Rubin, 73 Fed. (2d) 157.

POINT V.

If the Contract Gives Appellant the Rights Which He Claims (i. e., Priority Over the General Creditors) Then He Must Have a "Security" as Defined in the Corporate Securities Act.

We will now consider the contention made in Appellant's Brief that the contract in question is not a security under the Corporate Securities Act. If we are correct in either of the propositions already advanced in this Brief, namely: That Appellant and The Elmer Company were joint adventurers, or that no equitable lien is created by the contract, then it becomes immaterial whether a permit from the Commissioner of Corporations was requisite. We believe that if the Court concludes that Appellant was not a joint adventurer, and that he did acquire an equitable lien, that then it must follow that he obtained an "evidence of indebtedness," or "certificate of interest or participation," or "certificate of interest in an oil lease," as those terms are used in Section 2 (A) * * * 7 of the California Corporate Securities Act.

The Corporate Securities Act of California, as amended in 1929 (Chap. 707, Statutes of 1929, page 125), defines a security in Subdivision 7, Section 2 thereof, as follows:

> "The word 'security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining lease, collateral trust certificate, preorganization certificate, preorganization subscription, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, or any other instrument commonly known as a security."

The intention of the Legislature in defining a security was to use the word "security" broadly, and this has been reflected in the California decisions construing various instruments and schemes as being within the purview of the act.

In re Gerard, 186 Cal. 718;

People v. McCalls, 63 Cal. App. 783.

In the present case, The Elmer Company, Ltd., was engaged in the business of exploring for oil, and drilling oil wells [R. 27, 28]. If Appellant's theory is correct and this agreement operated as an assignment of or an equitable lien upon, a percentage of the income from the described property, it is tantamount to receiving a portion of the income of The Elmer Company, for these operations comprised the business of the company.

At the time the contract [R. 27] was executed there was no oil being produced on the property affected by it, and the possibility of production, that is, the property in the oil was a mere expectancy, from which it follows that any money to be derived from the sale of the expected oil was also an expectancy.

In Paragraph 5 of the contract, we find the language:

> "It is the intention of the parties hereto that the payments shall be made by first party to second party only as, when and if oil is produced from said wells by first party. * * *"

We have, of course, contended throughout this brief, that this constituted a measure for determining The Elmer Company's debt to Appellant and was not an assignment or equitable lien. However, if Appellant's con-

tention is correct, then it could only be an assignment of or a lien upon a share in the possible income or proceeds of a business carried on for profit.

It is the great weight of authority throughout the United States that an instrument which gives the right to share in the income or proceeds of any enterprise or business carried on for profit, is a security within the meaning of the various Blue Sky Laws.

See:

State v. Gopher Tire & Rubber Co., 177 N. W. 937;

State v. Summerland, 185 N. W. 255, 150 Minn. 266;

State v. Evans, 191 N. W. 425;

State v. Ogden, 191 N. W. 916;

Harris v. U. S. Mexico Oil Co., 110 Kans. 532;

State v. Cosgrove, 36 Idaho 278;

Penrose v. Cooper, 224 Ill. App. 111;

Wagner v. Kelso, 195 Iowa 959;

Weisendanger v. Lind, 114 Kans. 523;

King v. Commonwealth, 197 Ky. 128;

Schmidt v. Storty, 208 Mo. App. 439;

Groby v. State, 109 Ohio St. 543.

One of the latest expressions of the California Courts, construing the Corporate Securities Act, is found in *People v. Oliver,* 102 Cal. App. 29, where the Court says:

> "If a unit issued by an individual represents a division of the assets of a business carried on for profit, or in the distribution thereof or the right to participate in the profits, earnings or income derived

from such assets, it is a security under the definition of subdivision 2, Section 8, of the Corporate Securities Act as amended.

"If the instrument of sale creates a present right to a present or future participation in either the income, profits or assets of a business carried on for profit, it is a 'security' as defined in the Corporate Securities Act. Because the interest created will not return a profit until the performance of a future act, such as the sale of an interest in a patent, or the grant to a license of the right to use it (*or the drilling of an oil well or the sale of oil produced therefrom*) does not bring it without the provisions of this act. To hold otherwise would make the real test of the legality or illegality of the sale the ultimate success or failure of the venture." (Italics ours.)

POINT VI.

Appellee Has the Right to Assert the Necessity of a Permit From the Corporation Commisioner.

Appellant, in his Brief, has gone to great lengths in an attempt to distinguish *DeMille Productions v. Woolery,* 61 Fed. (2d) 45, decided by this Court in 1932. His argument seems to rest upon a finely drawn distinction between an equitable lien and an equitable assignment. The latter admittedly comes under the Corporate Securities Act but the former, under Appellant's contention, does not. It may be well at this point to consider the practical result of such a contention if upheld. It would mean that the entire effectiveness of the California Corporate Securities Act could be nullified by the simple expedient of issuing to an investor in an oil drill-

ing project, an instrument which was neither an assignment of any oil, present or potential, nor of the funds to be derived therefrom, but which was a promise to pay him a certain proportion of the value of the first oil produced, which payment was to be made at the time and in the manner of payments of landowner's royalties. Appellant's contention further is that this type of an instrument, while escaping all the prohibitions of the Corporate Securities Act, nevertheless affords the holder all the benefits of a first mortgage security entitling him to payment in advance of general creditors who had no notice or knowledge of the agreement. We cannot believe that such a revolutionary conclusion will be reached by the Court in this case.

With respect to the first part of Appellant's contention, namely, that the distinction between an equitable assignment and an equitable lien is so pronounced that the one falls within and the other without the purview of the Corporate Securities Act, we submit that no such distinction exists and that the essentials of the two are practically identical. In *Remington on Bankruptcy,* Volume 4, page 157, it is stated, "an equitable lien springs from an equitable assignment and the essentials of the two are practically identical." Citing *In re Dier,* 296 Fed. 816. In fact many Court and text writers make little if any distinction between the two. In the long annotation in 32 A. L. R. 950, appended to *Interborough Consolidated Corporation, supra,* the two subjects are treated together and frequent statements such as the following appear:

> "It has also been held that no equitable lien or assignment is created by an agreement to pay a debt out of a certain fund or property of the promisor when he gets it."

Citing *Wemple v. Hauenstein,* 46 N. Y. Supp. 288, in which the two terms are constantly used without distinction.

We do not mean to be understood that no definition of an equitable lien can be framed which would exclude an equitable assignment, or *vice versa,* but we do mean that the distinction, if any, is so slight that it could not have the effect of excluding an equitable lien from the operation of the Corporate Securities Act, while an equitable assignment was included.

Appellant, in an effort to have this Court reverse its decision in *DeMille Productions v. Woolery, supra,* has cited the following California cases:

Eberhard v. Pac. Southwest Loan & Mortgage Corp., 215 Cal. 226, 9 Pac. (2d) 302;

Hale v. Harbor Petroleum Corporation, 139 Cal. App. 459, 33 Pac. (2d) 1039;

Domestic & Foreign Petroleum Co. v. Long, 4 Cal. (2d) 554, 51 Pac. (2d) 73;

White v. Cascade Oil Co., 85 Cal. App. Dec. 1988, 58 Pac. (2d) 994;

Western Oil Co. v. Venago Oil Corp., 218 Cal. 733, 24 Pac. (2d) 971.

The *Eberhard* case, *supra,* is the leading case in this group and is followed to a considerable extent in each of the other cases. The original decision in this case and also the one affirming the judgment on rehearing were both considered by this Honorable Court in deciding *DeMille Productions Co. v. Woolery,* wherein the Court says:

"The appellant relies heavily upon the case of Eberhard *et al.* v. Pacific Southwest Loan & Mort-

> gage Corporation (Cal. Sup.), 1 P. (2d) 420, 421, judgment affirmed on rehearing, March 22, 1932 (Cal. Sup.), 9 P. (2d) 302. We have carefully examined that case, and do not believe that it is applicable here."

Furthermore, it should be pointed out that of this group, the *Eberhard* case, the *Hale* case, and the *White* case merely lay down the rule that where the purchaser of securities is not in *pari delicto* with the seller, that he may enforce them against the seller, or an assignee of the seller with notice, under the maxim that "no one can take advantage of his own wrong."

The remaining two cases indicate when a buyer of securities may or may not be in *pari delicto* with the seller. In *Western Oil and Refining Co. v. Venago Oil Corp., supra,* the Court says:

> "* * * the purchaser will not be held to be in *pari delicto* unless there is a conspiracy or intent to fraud and evade the act, or the terms of a permit actually issued, in which the purchaser participates, *or other reasons making it inequitable to grant relief.*" (Italics ours.)

We submit that in the present case, there are ample reasons making it inequitable to grant the relief sought by Appellant. Many of these reasons have been already stated, but they may be briefly summarized here. The relief sought by Appellant would grant him a priority over the other creditors in this receivership estate, notwithstanding the fact that under the terms of his contract [R. 27] he might have reaped a huge profit had the drilling enterprise of The Elmer Company proved successful. In other words he would have both the advan-

tages of a partner and a secured creditor, without the disadvantages of either. The most recent California case on the subject is *Domestic v. Long, supra.* In this case certain of the purchasers of securities were held to be in *pari delicto* with the issuer, and certain others not to be in *pari delicto* with it. Respecting the Defendant E. Earl Parish, the Court says:

> "Thus, within a short period he appeared as both assignor and assignee. In this situation it must be held in the absence of evidence of special circumstances that in the transaction in which he appeared as assignee he was equally culpable with his assignors. Randall v. California Land Buyers Syndicate, 217 Cal, 594, 20 P. (2d) 331; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 615, 275 P. 418."

While of course there is nothing in the present contract which amounts to an assignment, nevertheless, the agreement is so drawn that no blame can be attached to The Elmer Company which could not be equally attached to Appellant. They each made their contribution to a joint adventure, and each retained the right to withdraw therefrom whenever the adventure appeared to be unprofitable. So far as the knowledge of the law and of the facts are concerned, they were on a parity and we cannot see that one party to this agreement was any more guilty of an illegal act than was the other.

Appellant apparently concludes from his review of the five California cases cited *supra,* commencing with the *Eberhard* case, that neither the issuer of the securities nor its Receiver or Trustee can assert their invalidity as against a purchaser who is not in *pari delicto.* This argument amounts to a declaration that only purchasers of securities may assert their invalidity. However, this conten-

tion is directly refuted by the most recent holding of the California Courts on this subject in *Julian v. Schwartz,* 86 Cal. App. Dec. 758, 766, 60 Pac. (2d) 887, decided August 28, 1936, rehearing denied September 26, 1936, hearing in the Supreme Court denied October 26, 1936.

After reviewing the *Eberhard* and *Domestic* cases, and quoting from the *Western Oil* case, the Court, in the *Julian* case, goes on to say:

> "It is not the purpose herein to hold that only purchasers of securities may assert their invalidity. *Likewise creditors or their representatives and others may assert the invalidity of oil and gas royalties issued in violation of the Corporate Securities Act.* One purpose of the act is to protect merchants and tradesmen. People v. Kuder, 98 Cal. App. 206, 216, 217, 276 P. 578; Cecil B. DeMille Productions, Inc. v. Woolery (C. C. A.), 61 F. (2d) 45, 49." (Italics ours.)

By this decision the California Courts have specifically reserved to the representatives of creditors of the issuer of securities the right to assert the invalidity of the securities under the Corporate Securities Act. Appellant in this case as Receiver of The Elmer Co., Ltd., is a representative of the creditors of that company within the meaning of the above quoted decision in the *Julian* case.

In *DeMille Productions v. Woolery, supra,* this Court says at page 49:

> "*And the receivers represent the creditors.* In Jacobson, etc. v. Allen, etc., and others (C. C.), 12 F. 454, 456, 457, the court said: 'The receiver of an insolvent corporation makes his title through the corporation. He cannot through his appointment acquire that which the corporation never had. He rep-

> resents the creditors of the corporation in the administration of his trust, but his trust relates only to the corporate assets. As trustee for creditors he represents them in following the assets of the corporation, and *can assert their rights in cases where the corporation could not have been heard.*'" (Italics ours.)

In addition to being authority directly contrary to Appellant's contention that the Appellee herein as receiver of The Elmer Company has no right to assert the invalidity of Appellant's contract, *DeMille Productions v. Woolery, supra,* also disposes of the contentions made on pages 21 to 23 of Appellant's Brief that the California Corporate Securities Act would be unconstitutional if extended to the contract in question.

POINT VII.

There Is No Support for Appellant's Assertion That He Should Be Allowed a Prior Claim.

Appellant offers no argument to support his assertion made in the last paragraph of his Brief (Appellant's Brief, p. 48) that he should be allowed a prior claim against the Receiver and the Receivership Estate. He evidently intends to make this contention since at page 5 of the same Brief he states that the question involved is whether his claim is a preferred or a general claim against said Receivership. We find, however, no other reference in his Brief to this matter, and as we have already pointed out, under the heading "Statement of Issues Involved," Appellant never denominated his claim a prior claim, and we are at loss to understand on what basis he now asserts it to be such.

Even if all the contentions made in Appellant's Brief were held to be true, it would only have the effect of placing the claim in the fourth category as we enumerated them at the beginning of this brief—that is to say—an equitable lien against certain funds in an amount to be determined under the provisions of the contract of November 25, 1929, with an accounting, if necessary, to determine the cost factors involved.

Conclusion.

The contract of November 25, 1929, between The Elmer Co., Ltd., and Appellant sets up a formula for determining the amount Appellant is to be paid, which formula involves three uncertain and variable factors:

1. The value of oil produced.

2. The amount of Appellant's charges.

3. The total cost of drilling the wells.

There was neither maximum nor minimum to the amount Appellant might receive under this contract. He is, therefore, a joint adventurer with The Elmer Co., Ltd., and as such, all debts to him are subordinate to those to the general creditors. Appellant has no equitable lien for it does not clearly appear that the parties to the above contract intended to charge a particular fund as security for the debt and at most, the contract merely evinces an expectation that the debt will be paid out of a particular fund. If, notwithstanding the foregoing, the Court holds that the contract entitles Appellant to an equitable lien,

then he must have a "security" as defined in the Corporate Securities Act, and the Appellee herein is not precluded from advancing this contention under the recent authorities. There is no basis for Appellant's assertion that he should have a claim prior to the general creditors.

Appellee respectfully urges that this Court, as it has the power to do, should adjudge Appellant a joint adventurer with The Elmer Co., Ltd., and as such, subordinate his claim to those of the general creditors.

Respectfully submitted,

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Attorney for Appellee.